

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE )  
WASTE ACTION PROJECT; )  
WASHINGTON PUBLIC EMPLOYEES )  
FOR ENVIRONMENTAL )  
RESPONSIBILITY; RESOURCES FOR )  
SUSTAINABLE COMMUNITIES; and )  
CITIZENS FOR A HEALTHY BAY, )  
Appellants, )  
v. )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
Respondent, )  
And )  
ASSOCIATION OF WASHINGTON )  
BUSINESS and WASHINGTON STATE )  
DEPARTMENT OF TRANSPORTATION, )  
Intervenors. )  
\_\_\_\_\_ )

PCHB NO. 00-173  
(Construction Storm Water Permit)

ORDER ON MOTION  
FOR SUMMARY JUDGMENT

Appellants Puget Soundkeeper Alliance, Waste Action Project, Washington Public Employees for Environmental Responsibility, Resources for Sustainable Communities and Citizens for a Healthy Bay (hereafter referred to collectively as Puget Soundkeepers) have filed an appeal challenging the terms of a National Pollution Discharge Elimination System (NPDES) Baseline General Permit for Stormwater Discharge Associated with Construction Activities (Construction Stormwater Permit) issued by the Washington State Department of

Ecology (Ecology). The Association of Washington Business (AWB) and Washington State Department of Transportation (DOT) have been granted intervenors status as respondents in the case.

Puget Soundkeepers have moved for summary judgment on the issues raised in their appeal. They have also moved for a stay of the permit, which motion is being addressed in a separate Order of the Board. The matter came before the members of the Pollution Control Hearings Board, Robert V. Jensen, James A. Tupper, Jr. and Kaleen Cottingham.

Administrative Appeals Judge, Phyllis K. Macleod is presiding for the Board on this case. The following documents were considered in deciding this motion for summary judgment:

1. Appellants Motions for Stay and Summary Judgment.
2. Declaration of Richard Smith with Exhibits A-DD.<sup>1</sup>
3. Ecology Response in Opposition to Appellants' Motions for Stay and Summary Judgment.
4. AWB's Memorandum in Opposition to Appellants Motion for Summary Judgment and Stay.
5. Declaration of Lori A. Terry with Exhibits A-D.
6. Declaration of Edward Molash with attachments.

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<sup>1</sup> Respondents have moved to strike portions of the Richard Smith affidavit on the basis that it contains testimony of counsel. The Board recognizes that attorney affidavits should simply provide copies of relevant information without highlighting or commentary. The affidavit, however, will not be stricken. It is not prejudicial and no weight will be given to any objectionable portions.

7. Reply Supporting Appellants' Motions for Stay and Summary Judgment
8. Notice of Appeal and documents of record in the case file.

Based on the record and evidence before the Board on the Motion for Summary Judgment, the Board enters the following decision.

### **FACTS**

In October 2000 Ecology issued the general stormwater permit for construction activities which is being challenged in this case. In establishing the terms of the general permit Ecology was engaged in implementing the Federal Clean Water Act (CWA), 33 U.S.C. §§1251-1376 and the provisions of the Washington State Water Pollution Control Act, Chapter 90.48 RCW and their accompanying regulations.

General permits are a mechanism developed to provide an efficient way to regulate large numbers of entities involved in similar types of activity. Companies wishing to pursue discharge through a general permit file a Notice of Intent (NOI) that indicates their desire to obtain coverage under the general permit. Ecology has the right to deny coverage within 30 days of the NOI, but in the absence of denial, coverage is extended under the NOI. Entities covered by the general permit are required to conduct their operations in compliance with the terms and conditions set forth in the text of the permit.

The October 2000 permit was the third stormwater general permit that Ecology has issued covering construction discharges. The first such general permit, issued in 1992, covered both construction and industrial activities. The reissuance in 1995 involved separate general

permits for industrial and construction activities. The stormwater permits have primarily used technology based best management practices to control pollutants in stormwater discharges. The permits have not contained numeric effluent limits and have not required water sampling and analysis. The 2000 permit is substantially the same as the 1995 version of the Construction Stormwater Permit and utilizes a similar approach to achieving stormwater discharge compliance.

The Construction Stormwater Permit requires permittees to prepare and implement a Stormwater Pollution Prevention Plan (SWPPP). The SWPPP is to identify best management practices (BMP's) to minimize erosion and sediment from rainfall runoff at construction sites and to identify, reduce, eliminate or prevent the pollution of stormwater. SWPPP's must be prepared before construction activities begin. They are not submitted to Ecology for approval or review, but are required to be available on site. The public can obtain access to a SWPPP through request to Ecology. BMPs are to be selected from the Stormwater Management Manual for the Puget Sound Basin for inclusion in the SWPPP. Inspections every week and within a day of a substantial rainfall are required to make sure the BMPs are properly maintained and functioning.

The appellants contend that the terms of the Construction Stormwater Permit fall short of the minimum necessary for compliance with federal and state law. They further assert that there are no disputed issues of material fact and that the case is ripe for summary judgment. The respondents oppose the entry of summary judgment and argue, in the alternative, that there are disputed issues of material fact.

## ANALYSIS

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. Jacobsen v. State, 89 Wn. 2d 104, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. Rainier Nat'l Bank v. Security State Bank, 59 Wn. App. 161, 164, 796 P. 2d 443(1990), *review denied*, 117 Wn. 2d 1004 (1991).

The party moving for summary judgment must show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Magula v. Benton Franklin Title Co., Inc., 131 Wn. 2d 171, 182; 930 P. 2d 307 (1997). A material fact in a summary judgment proceeding is one that will affect the outcome under the governing law. Eriks v. Denver, 118 Wn.2d 451, 456, 824 P. 2d 1207 (1992). Summary judgment can also be granted to a non-moving party when the facts are not in dispute. Impecoven v. Dept. of Revenue, 120 Wn. 2d 357, 365, 841 P. 2d 752 (1992). Many of the issues argued in this case raise disputed issues of material fact that preclude the entry of summary judgment. Each of the topics raised by the appellants will be addressed separately.

1. Whether The Construction Stormwater Permit Fails to Require Compliance with Water Quality Standards.

Puget Soundkeepers allege that the terms of the Construction Stormwater Permit improperly fail to require that permittees comply with water quality standards. While the Board does not adopt the standard of review espoused by the respondents,<sup>2</sup> the record reflects factual disputes about the application of the permit language in certain anticipated situations. Particular controversy surrounds application of the permit language to facilities when BMP's are not initially successful in avoiding violation of water quality standards and further refinement is necessary. Given the importance of the issues, the Board believes a full factual record is imperative in analyzing the impact of the permit on compliance with water quality standards. Summary judgment on this issue will be denied.

2. Whether The Construction Stormwater Permit Must Include Specific Monitoring Requirements.

Puget Soundkeepers argue that the Construction Stormwater Permit is invalid because it does not contain a requirement for effluent sampling and analysis. The CWA provides discretion to a permitting agency in developing necessary monitoring by prefacing the provisions of 33 U.S.C. §1318(a) with the language: “[W]henever required to carry out the objective of this chapter . . . the Administrator shall require . . .” The facts as to whether

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<sup>2</sup> Ecology and AWB argue for a standard of review similar to a rule challenge or constitutional challenge. They would require a showing that there is no set of circumstances in which the permit could be constitutionally applied.

Ecology has abused its discretion as to monitoring are not undisputed. Summary judgment is inappropriate under the circumstances and the motion will be denied.

3. Whether The Construction Stormwater Permit Should Exclude Dischargers to §303(d) Listed Waters from Coverage.

The appellants contend that coverage under the Construction Stormwater Permit should not be extended to discharges entering §303(d) listed waters. The merits of this argument are discussed in the Board's Order Granting Partial Stay in this case. There are disputed issues of fact relating to the process for delineation of §303(d) waters and the development and implementation of TMDL studies. The Board does not find the issue ripe for summary judgment and it will be set over for hearing.

4. Whether The Construction Stormwater Permit Fails To Meet The Anti-Degradation Requirements of the CWA and State Law.

Puget Soundkeepers assert that Ecology failed to conduct an antidegradation analysis for the Construction Stormwater Permit and that as a result, the permit should be remanded to Ecology for conduct of an analysis and reissuance of the permit. The appellants have failed to establish undisputed facts demonstrating that the Construction Stormwater Permit would lead to violation of antidegradation standards. The respondents contend that application of the Construction Stormwater Permit conditions will avoid degradation of the State's waters. Given the existence of disputed facts regarding the potential for degradation posed by the

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There is no legal support for extending such a standard to this type of case. The Board is persuaded that the proper review is based upon whether the permit is consistent with the applicable legal requirements.

Construction Stormwater Permit, summary judgment on a procedural or substantive violation is inappropriate.

5. Whether The Fact Sheet Is Deficient

Ecology was required to prepare a fact sheet in connection with the draft Construction Stormwater Permit. WAC 173-226-110(1). The items to be contained in the fact sheet are outlined in WAC 173-226-110(1). Appellants are dissatisfied with the quality of the fact sheet for the Construction Stormwater Permit. Several perceived deficiencies have been delineated in the briefing, ranging from failure to identify the geographic scope of the permit to inadequate explanation of the legal and technical grounds for the conditions in the general permit. After reviewing the individual items identified by the appellants, the Board finds that none of the specified problems is significant enough, solely or in combination, to invalidate the permit adoption process. With few exceptions, the required topics were addressed in the permit. Disagreements with the substance of the comments go more to the issues in dispute in the case than to the legal sufficiency of the fact sheet. As to certain items, such as the dilution zone, a reasonable explanation of the omission has been provided. Overall, the fact sheet is not so deficient that the entire permit process should be invalidated. Summary judgment dismissing the fact sheet claims is appropriate under the facts of the case.

Based on the foregoing analysis the Board enters the following :



**ORDER**

1. Appellants' Motion for Summary Judgment is denied.
2. Summary Judgment is granted dismissing appellants' claim that the fact sheet is legally insufficient.
3. All other matters in the case will proceed to hearing on the scheduled dates.

DONE this \_\_\_\_\_ day of \_\_\_\_\_ 2001.

POLLUTION CONTROL HEARINGS BOARD

\_\_\_\_\_  
Robert V. Jensen, Chair

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James A. Tupper, Jr.

\_\_\_\_\_  
Kaleen Cottingham

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Phyllis K. Macleod  
Administrative Appeals Judge, Presiding